

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOHN DEAN ANDRADE,

Defendant-Appellant.

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UNPUBLISHED

January 25, 2005

No. 251410

Muskegon Circuit Court

LC No. 03-048864-FC

Before: Smolenski, P.J., and Saad and Bandstra, JJ.

PER CURIAM.

Defendant appeals as of right his bench trial conviction of assault with intent to do great bodily harm less than murder, in violation of MCL 750.84, and possession of a firearm during the commission of a felony, in violation of MCL 750.227b. Defendant was sentenced to 6 years and 8 months to 10 years in prison for the assault with intent to do great bodily harm less than murder conviction, to run consecutive to 2 years in prison for the felony-firearm conviction. We affirm.

Defendant first argues that there was insufficient evidence to sustain his conviction. Specifically, defendant challenges the sufficiency of the evidence regarding his identity as the shooter. “[A] challenge to the sufficiency of the evidence at a bench trial is reviewed by considering the evidence presented in a light most favorable to the prosecution and determining whether a rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt.” *People v Daniels*, 172 Mich App 374, 378; 431 NW2d 846 (1988).

Identity is always an essential element in a criminal prosecution, *People v Oliphant*, 399 Mich 472, 489; 250 NW2d 443 (1976), and the prosecutor must identify the accused as the person who committed the alleged offense. *People v Kern*, 6 Mich App 406, 409-410; 149 NW2d 216 (1967). “Identity may be shown by either direct testimony or circumstantial evidence which gives the [trier of fact] an abiding conviction to a moral certainty that the accused was the perpetrator of the offense.” *Id.* Defendant argues that the evidence presented at trial concerning his identity as the shooter was insufficient because he was not formally identified in court.

Although defendant was not formally identified in court by the prosecution’s witnesses, they referred to him on numerous occasions during the course of their testimony. Defendant and the victim had known each other since they were children, and had been in a feud for a number of years. The eyewitnesses knew defendant personally, and their many references to defendant

(as “the defendant,” “him,” “John,” and “T.T.” (defendant’s nickname)) occurred in a context in which it was clear that they were referring to the individual on trial. *Id.* at 410. Further, the owner of the bar in which the shooting occurred had known defendant as a regular customer for two years, and identified defendant by name as the shooter, based on a surveillance camera videotape which was admitted at trial. Identity was not a disputed element in this case, and viewing the evidence in the light most favorable to the prosecution, the eyewitnesses’ implicit identification of defendant, the bar owner’s positive identification of defendant, and the videotape of the crime were sufficient to establish defendant’s identity as the shooter beyond a reasonable doubt.<sup>1</sup>

Defendant next argues that the trial court erred in failing to grant a directed verdict in his favor. First, we note that defense counsel did not formally move for a directed verdict. Rather, defense counsel merely stated during closing argument that the trial court “has to consider the possibility of acquittal on all charges because there’s no identification on the record.” To the extent defendant argues that the trial court should have sua sponte granted a directed verdict in his favor, MCR 6.419(A) provides only that “the [trial] court on its own initiative may” do so, and defendant fails to cite any authority to support his contention that the trial court was required to enter a directed verdict on its own initiative, thereby abandoning the issue. *People v Watson*, 245 Mich App 572, 587; 629 NW2d 411 (2001). Further, even if the issue had not been abandoned, there was sufficient evidence of defendant’s identity to sustain his convictions; therefore, it would have been inappropriate for the trial court to direct a verdict in favor of defendant in any event. *People v Harris*, 113 Mich App 333, 336; 317 NW2d 615 (1982). See also *People v Aldrich*, 246 Mich App 101, 122; 631 NW2d 67 (2001).

Alternatively, defendant argues that the trial court’s statement—“[m]y recollection here is that identity has not been established here by a person . . . and unless we reopen proofs here, the case is over”—was tantamount to rendering a directed verdict of acquittal, and that his double jeopardy rights were violated when the trial court allowed the prosecutor to reopen proofs. A double jeopardy challenge presents a question of constitutional law that we review de novo. *People v Nutt*, 469 Mich 565, 573; 677 NW2d 1 (2004). Both the United States and Michigan Constitutions prohibit placing a defendant twice in jeopardy for a single offense. US Const, Am V; Const 1963, art 1, § 15. These guarantees protect against multiple prosecutions for the same offense after an acquittal. *People v Herron*, 464 Mich 593, 599; 628 NW2d 528 (2001).

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<sup>1</sup> In light of our determination of the issue on this basis, we need not address defendant’s argument that the trial court abused its discretion in allowing the prosecution to reopen proofs so that the victim could formally identify defendant on the record. In any event, we note that the trial court has discretion to reopen proofs, *People v Herndon*, 246 Mich App 371, 419; 633 NW2d 376 (2001), and that no abuse of discretion occurred here because there was no undue advantage to the prosecution and no surprise or prejudice to defendant. *People v Solomon (Amended Opinion)*, 220 Mich App 527, 532; 560 NW2d 651 (1996), quoting *People v Collier*, 168 Mich App 687, 694-695; 425 NW2d 118 (1988). Further, to the extent defendant argues that the trial court “crossed the bounds of impartiality” in allowing the prosecution to reopen proofs, no abuse of discretion occurred, and defendant’s argument is without merit.

Generally, once a trial court enters a judgment of acquittal, the Double Jeopardy Clause prevents a second trial or other proceedings devoted to the resolution of factual issues going to the elements of the offense charged. *People v Vincent*, 455 Mich 110, 119; 565 NW2d 629 (1997). However, there was no directed verdict of acquittal here. It is well settled that “courts speak through their judgments and decrees, not their oral statements or written opinions,” and that “[a] judge’s thinking process should not have final or binding effect until formally incorporated into the findings, conclusions, or judgment.” *Id.* at 123, 125. “None of the indicia of formality associated with final judgments are present in the trial judge’s comments at issue here,” and “the loose impressions of the judge cannot be construed as an adequate evaluation of the evidence.” *Id.* at 125. “[I]n order to qualify as a directed verdict of acquittal there must be either a clear statement in the record or a signed order of judgment articulating the reasons for granting or denying the motion so that it is evident that there has been a final resolution of some or all the factual elements of the offense charged.” *Id.* at 126-127.<sup>2</sup> Here, defense counsel did not move for a directed verdict, and the trial court’s comments concerning the sufficiency of the evidence regarding defendant’s identity “lacked the requisite degree of clarity and specificity” necessary to constitute a directed verdict of acquittal. *Id.* at 127. Further proceedings were not barred by the double jeopardy clause, and defendant’s rights were not violated. Moreover, there was sufficient evidence of defendant’s identity to sustain defendant’s convictions; therefore, it would have been inappropriate for the trial court to direct a verdict in favor of defendant in any event.

Defendant next argues that he was denied the effective assistance of counsel when his attorney failed to move for a directed verdict of acquittal after the prosecution presented its proofs. “Whether a defendant has been denied the effective assistance of counsel is a mixed question of law and fact.” *People v Riley (After Remand)*, 468 Mich 135, 139; 659 NW2d 611 (2003). “To establish a claim of ineffective assistance of counsel, a defendant must show both that counsel’s performance was deficient and that counsel’s deficient performance prejudiced the defense.” *Id.* at 140. It is well settled that “[i]neffective assistance of counsel cannot be predicated on the failure to make a frivolous or meritless motion.” *Id.* at 142. And because the prosecution submitted sufficient evidence to sustain defendant’s conviction, defense counsel was not ineffective for failing to move for a directed verdict. *Id.* at 141-142.

Defendant next argues that the trial court abused its discretion in engaging in an upward departure from the appropriate sentence range. Under the legislative sentencing guidelines, a remand for resentencing is warranted if the trial court did not have a substantial and compelling reason for departing from the appropriate sentence range. MCL 769.34(11). We review the trial

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<sup>2</sup> In *Price v Vincent*, 538 US 634; 123 S Ct 1848; 155 L Ed 2d 877 (2003), the United States Supreme Court reversed the Sixth Circuit Court of Appeals’ grant of habeas corpus on double jeopardy grounds. The Supreme Court held that our Supreme Court’s decision was not “contrary to, or an unreasonable application of, [] clearly established precedents,” and the parties agreed that the decision was not “based upon an unreasonable determination of the facts.” *Id.* at 639-640, 643. In concluding that the decision was not an “objectively unreasonable application of clearly established law,” the Supreme Court noted that “numerous other courts have refused to find double jeopardy violations under similar circumstances.” *Id.* at 643. See *Allen v State*, 850 A2d 365, 375 n 5 (Md App, 2004).

court's determination that a particular factor warranting departure existed for clear error. *People v Babcock*, 469 Mich 247, 273; 666 NW2d 231 (2003). We review the trial court's determination that a particular factor is objective and verifiable as a matter of law. *Id.* Finally, we review a trial court's determination that the objective and verifiable factors present in a particular case constitute substantial and compelling reasons to depart from the statutory minimum sentence for an abuse of discretion, which occurs if the sentence falls outside the permissible principled range of outcomes. *Id.* at 274. However, defendant failed to object to the sentence imposed by the trial court; therefore, the issue is unpreserved and we review his claim of sentencing error for plain error affecting substantial rights. *People v Sexton*, 250 Mich App 211, 227-228; 646 NW2d 875 (2002).

At sentencing, the trial court stated:

Well, I've reviewed this matter and the guidelines we have revised down to 19 to 38 [months] and the Court rarely—I'm not sure—I can't count on probably one hand the number of times I've departed from the guidelines, but if I have ever seen a case that requires departure from the guidelines, it's this case. This case is outrageous, in my opinion. [Defendant's] conduct can be described as nothing less than ruthless, criminal, antisocial—I can't come up with enough words to describe—and before the Court of Appeals rushes to judgment as to what I'm about to do, I suggest they review and look at that tape, because I've never seen a more cold-blooded act—and I've been on this bench for 25 years—than what this man did. I gave him the benefit of the doubt on the question of whether he intended to murder this person and I still think my decision on that was correct, but as far as the danger that he presents to our community, the only way I can describe it is look at that tape. I can't think of a more dangerous person than someone who walks in with arrogance and the just cold-blooded nature that he carried out this offense. It was brutal. It was absolutely unjustified by any circumstance, and, frankly, I find [defendant] to be an extremely serious threat to a civilized community, and frankly I don't think the maximum for this offense is adequate. I don't think ten years is adequate for the offense, but the legislature does. And for that reason I definitely intend to depart from the guidelines. I don't think these guidelines at all take into consideration the nature of this offense, the nature in which it was carried out, the calamity it created for [the victim], and being shot with a gun in the belly like that for no reason whatsoever, nothing, there's absolutely no justification at all, and so what that tells me is that [defendant] is a very serious threat to our community. . . .

On the departure evaluation form, the trial court explained why the following aspects of this case led it to impose a sentence outside the recommended range:

The sentencing guidelines' range does not accommodate a sentence that is proportionate to the seriousness of the defendant's conduct. The victim was shot "point blank" by the defendant with a firearm. The extent of injuries to the victim were severe. The shooting was without provocation and the defendant's body language, as reflected in Exhibits 1 and 2, projected an arrogant, callous and cold-blooded disregard for the sanctity of life and/or limb. He is an extreme danger to

the community which needs protection from him for the maximum period allowed.

Defendant argues that the trial court erred in relying on factors that were already considered by the guidelines. MCL 769.34(3)(b) provides that “[t]he court shall not base a departure on an offense characteristic or offender characteristic already taken into account in determining the appropriate sentence range unless the court finds from the facts contained in the court record, including the presentence investigation report, that the characteristic had been given inadequate or undue weight.” Here, the trial court based its upward departure in part on the injuries inflicted on the victim, a factor already taken into consideration by OV-3, concerning “physical injury to a victim.” However, defendant was initially scored twenty-five points for “life threatening or permanent incapacitating injury [] to a victim,” and the trial court lowered the score to ten points for “bodily injury requiring medical treatment [] to a victim,” because it agreed with defense counsel that the victim’s injuries were not life threatening or permanently incapacitating, and therefore did not warrant a score of twenty-five points. Nevertheless, the trial court felt that it was appropriate to give additional weight to this factor, even though it had already been taken into account in determining the guidelines range, because of the nature of the victim’s injuries, i.e., the fact that he has to wear a colostomy bag for the remainder of his life, or undergo surgery to remedy the injury.<sup>3</sup> The trial court did not err in finding that the guidelines did not adequately account for the nature of the physical injury inflicted on the victim. Further, the trial court noted that the victim was actually shot here, a fact not taken into account by the offense variables scored in this case. *People v Lowery*, 258 Mich App 167, 171; 673 NW2d 107 (2003).

Next, we must determine whether the factors set out by the trial court are objective and verifiable, i.e., whether they are “external to the minds of the judge, defendant, and others involved in making the decision, and are capable of being confirmed.” *People v Geno*, 261 Mich App 624, 636; 683 NW2d 687 (2004). The injuries to the victim are clearly objective and verifiable. Additionally, the trial court described defendant’s conduct as “ruthless,” “criminal,” “antisocial,” “cold-blooded,” arrogant[t],” “brutal,” and “callous,” and found that defendant was an extreme danger to the community. These conclusions, although arguably subjective, were squarely based on objective evidence, i.e., the videotape recording of defendant’s unprovoked and excessively dangerous criminal behavior in a crowded bar. That behavior was the reason for the trial court’s departure and, having reviewed the videotape of the crime, we find this reasoning to be sufficiently objective and verifiable.

Finally, we must determine whether the trial court’s determination that the objective and verifiable factors constituted substantial and compelling reasons to engage in an upward departure constituted an abuse of discretion. A substantial and compelling reason is an objective and verifiable reason that keenly or irresistibly grabs our attention and is of considerable worth

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<sup>3</sup> To the extent defendant argues that the trial court made a mistake of fact in stating that the victim was shot in “the belly,” the record reveals that the trial court was aware that the victim was shot in the left buttock, and that the bullet went through the victim’s right thigh, severing his rectum, the last several inches of his lower intestine, or “belly,” in the process.

in deciding the length of a sentence. *Babcock, supra* at 272. The nature of defendant's conduct and the severity of the injury to the victim are objective and verifiable reasons that keenly and irresistibly grab our attention and are of considerable worth in deciding the length of defendant's sentence. The trial court did not abuse its discretion in determining that an upward departure was warranted.

We also conclude that the extent of the departure is proportionate to the seriousness of defendant's conduct. *Id.* There was no plain error affecting defendant's substantial rights in the trial court's upward sentencing departure, and defendant is not entitled to relief on this basis.

We affirm.

/s/ Michael R. Smolenski  
/s/ Henry William Saad  
/s/ Richard A. Bandstra